Sivamurthy s/o Muniandy & Ors v Lembaga Kumpulan Wang Simpanan Pekerja

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-633–10 OF 2011
SYED AHMAD HELMY, ABDUL WAHAB PATAIL AND ABDUL AZIZ ABDUL RAHIM JJCA
14 AUGUST 2012

Civil Procedure — Setting aside — Judgment in default — Whether judgment in default irregularly obtained — Whether should be set aside ex debito justitiae — Interpretation to non-obstante clause — Employees Provident Fund Act 1991 ss 46(1) and 65(1) — Whether provision should be interpreted broadly — Whether ss 46(1) and 65(1) would oust applicability of Limitation Act 1953

The present appeal arose when the appellant's application to set aside the judgment in default obtained against them was dismissed. The subject matter of the claim was for outstanding EPF contribution/payment between December 1992 and August 1993 together with dividend and interest. Upon a certificate of non-appearance being recorded, judgment in default was entered against the appellant. The appellant's appeal was dismissed by the High Court. The appellant's complaint was that the judgment in default, by reason of the non-service of writ, was irregularly obtained and hence should be set aside *ex debito justitiae*. The appellant's complaint was predicated by the AR cards which were returned by the post office without acknowledgment or signed by any recipient and did not bear the seal of the returning post office. Hence, the present appeal. The appeal centralised on the interpretation to be accorded to a *non-obstante* clauses in ss 46(1) and 65(1) of the Employees Provident Fund Act 1991 ('EPF Act'). The issue that arose was whether whether it should be interpreted broadly so as to render the Limitation Act 1953 ('Limitation Act') inapplicable such that the unremitted contribution was recoverable from the company and its directors notwithstanding that the limitation period had set in or whether it should be construed narrowly as to render the applicability of the Limitation Act prohibiting the recovery of unremitted contributions which exceeded the limitation period. The appellants contended that the phrase 'notwithstanding the provisions of any other written law' in ss 46(1) and 65(1) of the EPF Act did not oust the applicability of the Limitation Act.

Held, dismissing the appeal with costs of RM10,000:

(1) The challenge by the appellants on the judgment in default being an irregular judgment was without merits. The judgment in default recorded was a regular judgment. The respondent effected service of the

writ of summons on the last known address of the appellant as discerned from their addresses found in Form 49 filed with the Suruhanjaya Syarikat Malaysia. There was no evidence of any change of the appellant's addresses being brought to the attention of the respondent. The service through AR registered post by the respondent was in accordance with O 10 r 1(1) of the Rules of the High Court 1980. There was no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post. The presumption of service was not rebutted. There was no legal obligation imposed on the respondent to conduct a search at the National Registration Department to ascertain the latest address of the appellants (see paras 8–10).

(2) There appeared to be contrary decisions emanating from High Court judges. In construing the *non-obstante* terms 'notwithstanding anything to the contrary in any other written law' appearing in ss 46(1) and 65(1) of the EPF Act, it ought to be accorded a broad and liberal interpretation to achieve the purpose, function and objective of the EPF Act. A narrow approach would in the circumstances negate the cardinal purposive approach (see paras 15 & 17).

(3) The claim against the former directors was an unequivocal cause of action created by s 46(1) of the EPF Act for the purpose of enabling the EPF Board to go after directors or responsible individuals of errant companies or entities. The wording of s 46(1) of the Act reflects the legislative intent to provide a right or recourse against errant directors jointly and severally of defaulting companies which in law such right or recourse was non-existent because of the corporate personality concept (see para 18).

[Bahasa Malaysia summary

Rayuan ini berbangkit apabila permohonan perayu untuk mengetepikan penghakiman ingkar diperolehi terhadap mereka ditolak. Perkara tuntutan adalah untuk caruman/bayaran KWSP yang tertunggak di antara Disember 1992 dan Ogos 1993 bersama dividen dan faedah. Selepas sijil ketidakhadiran direkodkan, penghakiman ingkar dimasukkan terhadap perayu. Rayuan perayu ditolak oleh Mahkamah Tinggi. Aduan perayu adalah bahawa penghakiman ingkar, atas sebab writ tidak diserahkan, diperolehi secara salah aturan dan maka patut diketepikan *ex debito justitiae*. Aduan perayu didasarkan atas kad AR yang dikembalikan oleh pejabat pos tanpa penerimaan atau ditandatangni oleh mana-mana penerima dan tidak mempunyai cap pejabat pos yang mengembalikannya. Maka, rayuan ini. Rayuan berpusat ke atas tafsiran untuk diberikan kepada klausa-klausa *non-obstante* di dalam ss 46(1) dan 65(1) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP'). Isu yang berbangkit adalah sama ada ia patut ditafsiran secara luas untuk menyebabkan Akta Had Masa 1953 ('Akta') tidak beraplikasi dengan itu caruman yang tidak diremit diperolehi semula daripada syarikat dan pengarah-pengarahnya walaupun tempoh had masa telah tamat atau sama ada

A ia patut ditafsirkan secara sempit untuk memberikan pengunaan Akta menghalang pemerolehan semula caruman-caruman yang tidak diremit yang melebihi tempoh had masa. Perayu berhujah bahawa frasa 'notwithstanding the provisions of any other written law' dalam ss 46(1) dan 65(1) Akta KWSP tidak menyingkirkan penggunaan Akta.

B

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Bantahan perayu ke atas penghakiman ingkar sebagai penghakiman salah aturan adalah tanpa merit. Penghakiman ingkar direkodkan adalah
C penghakiman biasa. Responden menguatkuasakan penyerahan writ saman ke atas alamat terakhir perayu yang diketahui seperti yang dilihat daripada alamat-alamat mereka di dalam Borang 49 yang difailkan dengan Suruhanjaya Syarikat Malaysia. Tidak terdapat keterangan mengenai apa-apa pertukaran alamat-alamat perayu yang diketengahkan
D kepada perhatian responden. Penyerahan melalui pos berdaftar AR oleh responden adalah mengikut A 10 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980. Tidak terdapat keperluan untuk responden membuktikan penerimaan writ oleh orang yang dinamakan di dalam pos berdaftar AR. Anggapan penyerahan tidak dipatahkan. Tidak terdapat tanggungjawab
E undang-undang yang dikenakan ke atas responden untuk menjalankan carian di Jabatan Pendaftaran Negara untuk memastikan alamat terbaru perayu (lihat perenggan 8–10).

(2) Terdapat keputusan bertentangan berpunca daripada hakim-hakim
F Mahkamah Tinggi. Dalam mentafsirkan terma *non-obstante* 'notwithstanding anything to the contrary in any other written law' yang terdapat di dalam ss 46(1) dan 65(1) Akta KWSP, ia patut diberikan tafsiran luas dan liberal untuk mencapai tujuan, fungsi dan objektif Akta KWSP. Pendekatan sempit mungkin dalam keadaan akan menafikan
G pendekatan *cardinal purposive* (lihat perenggan 15 & 17).

(3) Tuntutan terhadap pengarah-pengarah terdahulu adalah kausa tindakan jelas yang dibentuk oleh s 46(1) Akta KWSP untuk tujuan membolehkan Lembaga KWSP menyaman pengarah-pengarah atau individu-individu yang bertanggungjawab daripada syarikat-syarikat
H atau entiti yang ingkar. Kata-kata s 46(1) Akta membayangkan niat perundangan untuk memberikan hak atau tuntutan terhadap pengarah-pengarah yang ingkar bersesama dan berasingan syarikat yang ingkar yang mana dari segi undang-undang hak atau tuntutan sedemikian tidak wujud kerana konsep personaliti korporat (lihat
I perenggan 18).]

Notes

For a case on judgment in default, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) para 7546.

Cases referred to

Lembaga Kumpulan Wang Simpanan Pekerja v Carimonde Sdn Bhd & Ors [2011] 3 MLJ 781; [2011] 6 CLJ 451, HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Goon Institution Sdn Bhd & Ors; Sateras Resources (M) Bhd (Third Party) [2011] 2 ILJ 526; [2011] 10 CLJ 403, HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor (unreported), HC (refd)

Lembaga Kumpulan Simpanan Wang Pekerja v Manfined Smisek & Ors [2009] 1 LNS 1719, HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased) [2010] 4 MLJ 762; [2010] 5 CLJ 23, CA (folld)

Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & 3 Ors v Employees Provident Fund Board , Civil Appeal (unreported) (refd)

Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112; [2008] 4 CLJ 175, CA (refd)

Legislation referred to

Companies Act 1965 Form 49
Employees Provident Fund Act 1991 ss 46(1), 65(1)
Interpretation Acts 1948 and 1967 s 17A
Limitation Act
Rules of the High Court 1980 O 10 r 1(1)

Appeal from: Civil Suit No S-21–51 of 2009 (High Court, Kuala Lumpur)

(Ramesh & Co) for the appellant.
(Azrul Afifi & Azuan) for the respondent.

Syed Ahmad Helmy JCA:

[1] The appellants herein are the second, fourth and fifth defendants in the court below and the appeal pertains to the dismissal of the appellant's application to set aside the judgment in default obtained against them on 1 July 2009.

[2] The suit was instituted against the appellants in their capacity as the

former directors of the company known as Euro-Asian F & B Services (M) Sdn Bhd ('the company') which has since been wound up.

[3] The subject matter of the claim is for outstanding EPF contribution/payment between December 1992 and August 1993 together with dividend and interest and upon a certificate of non-appearance being recorded judgment in default was entered against the appellants on 1 July 2009.

[4] The appellant's appeal was dismissed by the learned High Court judge. Hence this appeal.

[5] The issue for determination is the interpretation to be accorded to what is commonly referred to as a non-obstante clause appearing in ss 46(1) and 65(1) of the Employees Provident Fund ('EPF Act') — whether it should be interpreted broadly so as to render the Limitation Act inapplicable such that the unremitted contribution is recoverable from the company and its directors notwithstanding that the limitation period has set in or whether it should be construed narrowly as to render the applicability of the Limitation Act prohibiting the recovery of unremitted contributions which exceeded the limitation period.

[6] The principal contention of the appellants was that the phraseology 'notwithstanding the provisions of any other written law' appearing in the non-obstante ss 46(1) and 65(1) of the EPF Act did not oust the applicability of the Limitation Act.

[7] Before addressing the appellant's contention aforesaid I would deal with the complaint that the judgment in default, by reason of the non-service of the writ, was irregularly obtained and hence should be set aside *ex debitio justitiae*. The appellant's complaint is predicated by the AR cards which was returned by the post office without acknowledgment or signed by any recipient and does not bore the chop of the returning post office. The non-service of the writ and their absence of any knowledge of the proceedings was averred by the appellants in their supporting affidavits. In support of their complaint they referred to the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 where it was held:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules, some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debitio justitiae, that is to say irrespective of the merits and without terms.

[8] The challenge by the appellants on the judgment in default being an irregular judgment as advanced by learned counsel is without merits. It is our considered view that the judgment in default recorded herein is a regular judgment. The respondent effected service of the writ of summons on the last known address of the appellants as discerned from their addresses found in Form 49 filed with the Suruhanjaya Syarikat Malaysia. There is no evidence of any change of the appellant's addresses being brought to the attention of the respondent. The service through AR registered post by the respondent is in accordance with the provision of O 10 r 1(1) of the Rules of the High Court 1980.

[9] There is no necessity for the respondent to prove receipt of the writ by the person named in the AR registered post. The Court of Appeal in *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112; [2008] 4 CLJ 175 held:

> There was no provision of law that the plaintiff must also prove that the person so named in the post had received the writ of summons and statement of claim. Once the writ of summons and statement of claim are sent by AR registered post, it is prima facie proof of service unless the defendant is able to rebut this. From the facts, that presumption was not rebutted.

[10] Similarly from the factual matrix the presumption of service herein was not rebutted. We may also add that there is no legal obligation imposed on the respondent to conduct a search at the National Registration Department to ascertain the latest address of the appellants.

[11] Having disposed of the challenge as to the irregularity of the default judgment I shall now proceed to address the issue as to the applicability of the Limitation Act in the light of the non-obstante clause of ss 46(1) and 65(1) of the EPF Act.

[12] In the interpretation of statutory provisions, of utmost importance is to ascertain the intention of the legislature in promulgating the statute. Upon discovery of the true intention of Parliament the court is entrusted with the duty of adopting an approach that promotes the purpose or object underlying the statute or what is popularly known as the purposive approach. The Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265 sanctioned the purposive approach when it was opined:

> When constructing a taxing or other statute, the sole function of the court is to discover the true intention of Parliament. In that process the court is under duty to adopt an approach that produces neither injustice nor absurdity ie an approach that

promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.

[13] The purposive approach in fact is a legally recognised rule of interpretation as mandated by the Interpretation Acts 1948 and 1967. Section 17A whereof expressly provides:

> ln the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

[14] Having the rule of construction at the forefront, the starting point is to inquire as to the objective of the EPF Act 1991. In this connection we adopt the views expressed by Low Hop Bing JCA in *Lembaga Kumpulan Wang Simpanan Pekerja v Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased)* [2010] 4 MLJ 762; [2010] 5 CLJ 23 of the EPF Act 1991, being a piece of social legislation. At p 768 (MLJ); 29 (CLJ) thereof His Lordship stated:

> the EPF Act 1991 which is a piece of social, legislation wherein the underlying purpose or object is no doubt the promotion of the welfare of the members, in the context of beneficient social legislation, the provisions therein must receive a broad, liberal and functional or purposive interpretation — see *Golden Hope Plantations (Peninsular) Sdn Bhd (Ladang Sungei Senarut) v Sarawathy Kathan* [2009] 1 MLJ 611; [2009] 3 CLJ 335 (CA).

[15] We are not oblivious to the fact that there appears to be contrary decisions emanating from High Court judges. On the one hand there is the decision of Varghese George JC (as he then was) in *Lembaga Kumpulan Wang Simpanan Pekerja v Carimonde Sdn Bhd & Ors* [2011] 3 MLJ 781; [2011] 6 CLJ 451 and decision of Lee Swee Seng JC in *Lembaga Kumpulan Wang Simpanan Pekerja v Goon Institution Sdn Bhd & Ors; Sateras Resources (M) Bhd (Third Party)* [2011] 2 ILJ 526; [2011] 10 CLJ 403 which advocates the view that EPF Act did not oust the applicability of the Limitation Act — the rationale being the wording of the non-obstante terms in ss 46(1) and 65(1) being generally worded did not refer to any particular provision or legislation with the consequent result that it only ousted provisions in any other written law that conflict or clash with the statutory objective of the Act. In essence where the non-obstante clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude per se all other legislation or provisions in force in other legislation.

[16] On the other hand the following decision advocates the view excluding the applicability of the Limitation Act — decision of Hadhariah JC in the

unreported case of *Lembaga Kumpulan Wang Simpanan Pekerja v Lim Kek Bee & Anor*; decision of Zabariah J in *Lembaga Kumpulan Simpanan Wang Pekerja v Manfined Smisek & Ors* [2009] 1 LNS 1719 and the decision of Linton Albert J in *Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & 3 Ors v Employees Provident Fund Board* in Civil Appeal No 12–4 of 2006.

[17] In construing the non-obstante terms 'notwithstanding anything to the contrary in any other written law' appearing in ss 46(1) and 65(1) of the EPF Act we are of the considered view that it ought to be accorded a broad and liberal interpretation to achieve the purpose, function and objective of the EPF Act. A narrow approach as advocated in the cases of *Lembaga Wang Simpanan Pekerja v Carrimonde Sdn Bhd & Ors* and *Lembaga Wang Simpanan Pekerja v Goon Institution Sdn Bhd & Ors* would in the circumstances negate the cardinal purposive approach.

[18] The claim herein against the former directors is a unequivocal cause of action created by s 46(1) of the EPF Act 1991 for the purpose of enabling the EPF board to go after directors or responsible individuals of errant companies or entities. The wording of s 46(1) of the Act reflects the legislative intent to provide a right or recourse against errant directors jointly and severally of defaulting companies which in law such right or recourse was non-existent because of the corporate personality concept.

[19] In the circumstances we find no appealable error on the part of the decision of the learned High Court judge. The appeal as accordingly dismissed with costs of RM10,000. Decision of the High Court affirmed.

Appeal dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor